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April 29, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 12, 2004

Case No.: TIA-0135

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance with filing for state workers' compensation benefits for her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be granted.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part

852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.¹ Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.² Subpart E provides that all Subpart D claims will be considered as Subpart E claims.³ OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed intermittently as a utility operator in the boiling room at the DOE's Oak Ridge K-25 site for approximately nine years, from 1946 to 1947 and from 1953 to 1961.

The Applicant filed an application with the OWA, requesting physician panel review of one illness, malignant melanoma. The Applicant claimed that the Worker's illness was the result of being exposed to ionizing radiation during his work at the site.

The Physician Panel rendered a negative determination with regard to the claimed illness. The Panel agreed that the Worker had malignant melanoma, but stated that there was insufficient evidence to conclude that it was "more likely than not" that the melanoma was related to toxic exposure

¹ Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

² See *id.* § 3675(a).

³ See *id.* § 3681(g)

at the DOE site. The Panel cited the Worker's sun exposure as a risk factor.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In her appeal, the Applicant states that the melanoma was on the bottom of the Worker's foot, that there is no history of cancer in the Worker's family, and that the Worker was continually exposed to radiation at the Oak Ridge site -- he worked around "hot stuff" and ate lunch in contaminated work areas.⁴

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

As an initial matter, we note that the Panel appeared not to know, or consider, the location of the melanoma. The Panel referred to the Worker's sun exposure as a risk factor, but the record is manifestly clear that the melanoma was located on the bottom of the Worker's foot, see, e.g., Record at 25.

Moreover, the Panel applied an overly strict standard of causation. When the Panel considered whether it was "more likely than not" that the illness was related to a toxic exposure at DOE, the Panel did not comply with the Physician Panel Rule. The Rule requires a consideration of whether it is "at least as likely as not" that the illness was related to a toxic exposure at DOE. 10 C.F.R. § 852.8. The Panel's use of an overly strict warrants further consideration of the application. Further consideration should take into account the location of the Worker's melanoma and the results of the National Institute of

⁴ Applicant Appeal Letter, dated July 8, 2004.

Occupational Safety and Health (NIOSH) dose reconstruction that was pending at the time of the Panel report.⁵

As the foregoing indicates, the appeal should be granted. In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's grant of this appeal does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0135 be, and hereby is, granted.

(2) Further consideration of the application is warranted.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 29, 2005

⁵ See Record (Case History).